

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*
State Engineer

Plaintiff,

vs.

ROMAN ARAGON, *et al.*,

Defendants.

69cv07941-BB

RIO CHAMA STREAM SYSTEM

Section 1, Chama Mainstream

Subfile No. 267
Tract 22.17

**STATE OF NEW MEXICO'S REPLY TO
RESPONSE BY DAVID ORTIZ DATED FEBRUARY 15, 2011**

The Plaintiff State of New Mexico, *ex rel.* State Engineer ("State"), by and through its undersigned counsel, submits this Reply to the Response by David Ortiz filed February 15, 2011 (Doc. No. 10,001) ("Response").

David Ortiz agrees with the State that he is the owner of the water rights associated with Tract 22.17, and agrees that he was not served with a Notice and Order to Show Cause in the 1994 Show Cause proceedings for water rights under the Acequia de Chamita. (Response at 1-2). As discussed in the *State of New Mexico's Response to the Notice and Order to Show Cause dated November 29, 2010* (Doc. No. 9983) ("State's Response"), Ortiz is thus entitled to be served with a Notice and Order to Show Cause (OSC) regarding the priority date of his water rights on Tract 22.17. Ortiz states that he disagrees with the majority of the remainder of the State's Response because it is absurd and borders on the edge of insanity. (Response at 2). Although the precise nature of his disagreement is unclear, the State believes that Ortiz objects to the State's assertion that he, and any other persons to be served

with additional OSC, should only be allowed to contest the priority date offered by the State for water rights appurtenant to the tracts of land that these persons actually own and will be described in the additional OSC. (State's Response at 7-8). Ortiz first points out that he is a Commissioner of the Acequia de Chamita. (Response at 2). Although Ortiz is a current Commissioner of the acequia (one of three), the official and consistent position of the Acequia de Chamita has been to argue for a priority date of 1600 for all water rights under this ditch. *See Acequia de Chamita's Response to the Motions to Reconsider (Docs 9949 and 9951) by David Ortiz* at 3-4. (filed September 23, 2010, Doc. No. 9958). Although Ortiz may disagree with that decision, he cannot act alone in this matter on behalf of the Acequia de Chamita. Thus the fact that he is a current Commissioner of the acequia is irrelevant. The State also points out that Ortiz did not even attend the meeting of the Acequia de Chamita on February 4, 2011, to consider whether or not the acequia as an organization should appeal the Special Master's report. *Id.* (Affidavits of Alex Sisneros and Richard M. Salazar attached as Exhibits A & B).

Ortiz also appears to confuse the priority date for each claimant's water right with a priority date for an acequia. (Response at 2). The priority of a water right is an element of that right, and under our state statutes for the adjudication of water rights, every decree is required to declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use of such right. NMSA 1978, § 72-4-19. However, it has been long established under New Mexico law in cases where a community ditch or acequia has been constructed by the joint labor of all the water users, and water has then been put to beneficial use under that ditch or acequia, the right to divert water, or the water right, is appurtenant to specified lands, and that the right is a "several right owned and exercised by the individual [water user]." *Snow v. Abalos*, 18 N.M. 681, 695, 140 P. 1044 (1914). The officers of the community ditch or acequia in diverting the water act only as the agents of the individual water

right owner. *Id.* Thus, the water right and the priority of that right is not attached to the community ditch or acequia, and the ditch or acequia has no water right or priority separate and apart from the rights of its individual water users.¹ To state or indicate that a community ditch or acequia has a priority of a certain date (*see* report of the Rio Chama Watermaster dated December 22, 2009, p.11, attached to Ortiz Response at 7), is merely to state that all of the individual water rights served by that ditch or acequia share that same priority. Ortiz is entitled to a priority for the exercise of his own water right under the Acequia de Chamita, but under New Mexico law there is no separate priority for the community ditch. Thus, Ortiz cannot assert a claim to a priority for the ditch, nor should he be allowed to assert priority claims on behalf of other individual users.

Respectfully submitted,

/s/ Ed Newville

EDWARD G. NEWVILLE
Special Assistant Attorney General
Office of State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 867-7444 telephone
(505) 867-2299 facsimile

¹ State law enacted in 1978 granted to acequias and community ditches the power to acquire and hold property and water rights, and to transfer and use the property and water rights so acquired pursuant to law. *See* NMSA 1978, § 73-2-22.1. However, any right so acquired must necessarily be acquired from the water user who put the water to beneficial use and who owned that right. An acequia or community ditch acquires no water right simply by the appropriation and use of water by its members.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of February 2011, I filed the foregoing electronically through the CM/ECF system which caused the parties listed on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail, and served the following non-CM-ECF participants in the manner indicated:

via first class mail, postage prepaid addressed as follows:

David Ortiz
P.O. Box 1082
San Juan Pueblo, NM 87566

/s/ Ed Newville
EDWARD G. NEWVILLE